88 FLRR 1-1416

Department of the Air Force, Scott Air Force Base, IL and NAGE, Local R7-23

Federal Labor Relations Authority

5-CA-20109; 33 FLRA No. 73; 33 FLRA 532

October 28, 1988

Judge / Administrative Officer

Before: Calhoun, Chairman; McKee, Member

Affirmed at 90 FLRR 1-8045, 86-1080 (D.C. Cir. 01/26/90)

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72.663 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Impasse

Case Summary

THE FLRA ALTERS ITS POSITION ON THE NEGOTIABILITY OF CHANGES IN STARTING AND QUITTING TIMES. THE AUTHORITY CLARIFIES WHEN AN EMPLOYER WILL BE OBLIGED TO MAINTAIN THE STATUS QUO AFTER DECLARATION OF AN IMPASSE. On remand from the D.C. Circuit, the FLRA reversed its prior ruling that the change in the starting and quitting times of a single employee was de minimis and did not result in a duty to bargain over impact and implementation. Applying its revised test for impact bargaining, the Authority ruled that the impact on the employee, i.e., the loss of shift differential equal to 10% of his annual pay, was more than de minimis. Therefore, there was a duty to bargain. However, the employer had bargained to impasse with the union. It had then set an implementation date of 01/10/82. The union had written to FMCS to request its assistance in resolving the impasse as soon as possible. It did not inform the FMCS of the implementation date and did not follow up to seek assistance. The FLRA concluded that the mailing of the letter to the FMCS, without more, was insufficient to require the employer to maintain the status quo pending mediation. Moreover, the union failed to invoke the services of the FSIP at all. Under these circumstances the implementation of the schedule change was not an unfair labor practice. The FLRA took the opportunity to reexamine its prior rulings under which a change in an employee's working hours would be negotiable, unless it was integrally related to and therefore determinative of the numbers, types, and grades of employees assigned to any organizational subdivision, work project, or tour of duty. In the latter case, the change in working hours would be negotiable only at the election of the agency, 5 USC 7106(b)(1). The Authority now abolished this "subtle" distinction. Under its new interpretation, any change in starting and quitting times of employees, whether a one-hour or an eight-hour change, would be considered a change in the tour of duty negotiable only at the election of the employer. Nevertheless, the agency

would be obliged to bargain over impact and implementation of the change.

Full Text

DECISION AND ORDER ON REMAND

I. Introduction

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question before us is whether the Respondent committed an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) when it changed the hours of work of an employee before completing bargaining with the Charging Party (the Union) on proposals relating to the change. For the reasons stated below, we conclude that the Respondent did not violate the Statute, and we dismiss the complaint.

II. Procedural Background

In a previous decision in this case, Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA 857 (1985), the Authority held that the Respondent did not commit an unfair labor practice. The Authority found that the decision to change the employee's hours of work was not negotiable. Further, relying on, Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA 827 (1985) (SSA, Region V), the Authority found that the Respondent had no statutory duty to bargain over the impact and implementation of the change because "the impact or reasonably foreseeable impact of the change on the conditions of employment of bargaining unit employees was no more than de minimis." Scott Air Force Base, 20 FLRA at 860 (footnote omitted).

The Union petitioned the court for review of the Authority's decision. While that litigation was pending, the Authority issued its decision in Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) (HHS, SSA). That decision reassessed and modified the standard set out in SSA, Region V. Thereafter, the Authority requested remand of the instant case for further proceedings consistent with HHS, SSA. The court remanded the record on April 5, 1988, for that purpose.

By order dated July 8, 1988, we requested the parties to submit supplemental briefs addressing the application of current case law to the resolution of the unfair labor practice complaint before us. Supplemental briefs were filed, and we have considered them in reaching our decision.

III. History of the Case

A. Facts

In September and October 1981, the Respondent reviewed its operations and decided to change the hours of operation of the Battery Shop. At that time, the Battery Shop employed only one employee, Robert Porter, who worked from 3:00 a.m. to 11:30 a.m. Porter was responsible for distributing serviceable batteries and receiving returned unserviceable batteries from other operations at the facility.

The Respondent decided to change the hours so that the Battery Shop would be open between 7:00 a.m. and 3:30 p.m. The Respondent determined that this change in hours would: (1) improve the availability of batteries during peak usage hours; and (2) enhance Porter's safety because insufficient assistance was available to him between 3:00 a.m. and 7:00 a.m. if an accident occurred during those hours, due to the small number of employees working at those times. Judge's Decision, 20 FLRA at 863.

Accordingly, on October 21, 1981, the Respondent notified Porter that effective November 15, his hours would be changed to 7:00 a.m. to 3:30 p.m. and gave him the reasons for the change. On October 23, the Union requested that the Respondent bargain on the matter and postpone implementation of the change. The Respondent postponed implementation of the change and requested the Union to submit written proposals. The Union submitted proposals on November 19.

On December 1, the parties met and bargained but did not reach agreement. The parties

acknowledged that they were at impasse and the meeting ended. On December 23, the Respondent gave the Union written notice that it would implement the change on January 10, 1982, to allow Porter "time to make whatever personal adjustments he considers necessary." Id. at 864.

The Union responded on December 23, stating that "[w]e have no choice but to notify the FSIP [Federal Service Impasses Panel] and the FMCS [Federal Mediation and Conciliation Service] that we desire to have their services in this matter." Id. Also on December 23, the Union requested the Respondent to "maintain the status quo and help us enlist the help of the FMCS as soon as possible." Id. On the same day, the Union wrote a letter to FMCS stating that:

"The undersigned union representative has been negotiating with management at Scott Air Force Base, Illinois over the duty hours of a bargaining unit employee. We are now at impasse and request that you provide your services as soon as possible to help resolve the matter."

The letter noted that copies were also being sent to the Respondent and to the Panel. The Judge found that a return receipt indicated that FMCS received correspondence from the Union on December 28, 1981. Id.

In addition, on December 23 the Union sent the following letter to the Panel, with copies to the Respondent and to FMCS:

"The undersigned union representative has been engaged in negotiations with management at Scott Air Force Base, Illinois over the duty hours of one Mr. Robert Porter. I requested the aid of the FMCS in this matter and am notifying you of the situation and the union's desire for management to maintain the status quo during the impasse procedures."

The letter was sent by regular mail. No evidence of receipt by the Panel was provided at the hearing before the Judge. Id. at 865.

On January 8, 1982, the Respondent sent a letter to the Union which stated:

1. Be advised that it is our intent to petition the [Panel] for a POST IMPLEMENTATION decision regarding the matter of Mr. Robert L. Porter's duty hours. In this regard, management will abide by the decision.

2. The duty hours of Mr. Porter will be changed as previously stated in our letter dated 23 December 1981[.]

Id. (emphasis in original letter).

The Respondent implemented the change on January 10, 1982. Neither the Union nor the Respondent had any further communication with FMCS or the Panel on this matter either before or after the Respondent implemented the change.

The General Counsel filed an unfair labor practice complaint which alleged that the Respondent refused to negotiate in good faith with the Union by changing the hours of operation of its Battery Shop and Porter's duty hours without having completed negotiations with the Union concerning the substance, impact and implementation of the change.

B. The Judge's Decision

The Administrative Law Judge found that the change of hours constituted a change in Porter's starting and quitting times, and that the Respondent had an obligation to bargain over the decision to make the change as well as the impact and implementation of the decision. The Judge found that the parties had bargained and reached impasse.

The Judge noted that under the Statute, an agency may not implement proposals that are at impasse while resolution of those proposals is pending before the Panel, absent an overriding exigency requiring implementation at that time. The Judge rejected the Respondent's contention that an overriding exigency was present that would have permitted the Respondent to implement the change if the matter had in fact properly been before the Panel. However, he also found that the matter was not properly before the Panel because the Union did not effectively invoke the services of the Panel after the negotiations had reached impasse.

The Judge found that the Union's letter to the

Panel simply notified the Panel of the situation and did not request the Panel to intervene in the matter. He concluded that the letter merely supplied the Panel with a status report. Further, he found that the regulations governing Panel involvement were not followed if it was the Union's intent to invoke the Panel's processes. As found by the Judge, the Union's letter to the Panel was not accompanied by the supporting evidence required by the Panel's Rules and Regulations and the Union did not furnish this evidence to the Panel at any other time.

The Judge also stated that "[n]either the General Counsel nor the Union sought to explain why, if the Union was genuinely seeking FSIP and FMCS intervention in this matter, it did-not communicate with those agencies after the initial letters of December 23 were sent." Judge's Decision, 20 FLRA at 867 n.7. The Judge found that, moreover, the Panel did not acknowledge receipt of the Union's letter or in any way suggest that it was aware its assistance was being sought.

The Judge determined that in these particular circumstances the Union did not invoke the processes of the Panel after impasse and the matter was not before the Panel. The Judge concluded that the Respondent was, therefore, permitted to implement the change at the time that it did. Accordingly, the Judge recommended dismissal of the complaint.

C. Exceptions to the Judge's Decision

The General Counsel and the Union excepted to the Judge's finding that the Union had not properly invoked the services of the Panel and to his finding that the Respondent was warranted in implementing the change when it did. The General Counsel argued that even if the Union had not strictly complied with the Panel's procedures, the matter was properly before the Panel because the Union's letter to the Panel constituted a request for assistance. The General Counsel argued that in any event the Respondent unlawfully refused to complete its bargaining obligation because the Respondent implemented the change despite acknowledging that the Union considered the matter to be before the Panel.

The Union argued that even if the services of the Panel were not properly invoked, the Respondent was still under an obligation to maintain the status quo. The Union argued that the spirit of the Statute requires agencies to maintain the status quo while parties are given a reasonable chance to resolve impasses. The Union contended that because the Panel requires that the services of FMCS be exhausted before the Panel will act, invoking the services of FMCS must be considered the first step in the process of invoking the services of the Panel. The Union argued that because it clearly had invoked the services of FMCS, the statutory impasse resolution process had begun.

The Respondent excepted to the Judge's finding that the substance of its decision to make the change in question was within the duty to bargain. The Respondent noted that as a result of a study of its operations it had determined that it could best solve the problems of the availability of batteries during peak usage hours and the safety hazard caused by Porter working alone from 3:00 a.m. and 7:00 a.m. by having the Battery Shop open between 7:00 a.m. and 3:30 p.m. The Respondent argued that the decision to change the employee's tour of duty was integrally related to the right of management to determine the numbers and types of employees assigned to a tour of duty or work project and was, therefore, negotiable only at the election of the Respondent under section 7106(b)(1) of the Statute. The Respondent also filed an opposition to the exceptions of the General Counsel and the Union, arguing in support of the Judge's finding that the Union failed to properly invoke the processes of the Panel.

D. The Authority's Decision in 20 FLRA 857

On December 13, 1985, the Authority issued its Decision and Order in Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA 857. The Authority found that the change in question was not a change in Porter's starting and quitting times, but rather constituted the abolishment of Porter's prior tour of duty and the establishment of a new tour of duty. The Authority found that the decision to

establish the new tour of duty was integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to a tour of duty and was, therefore, negotiable only at the election of the Respondent under section 7106(b)(1) of the Statute.

The Authority also found that under then existing Authority precedent, the Respondent was obligated to notify the Union and bargain on request concerning the procedures to be observed in implementing a change in the tour of duty if the change resulted in an impact or reasonably foreseeable impact on the conditions of employment of bargaining unit employees that was more than "de minimis." Applying SSA, Region V, the Authority determined that the impact or reasonably foreseeable impact of the change involved did not meet this standard. In reaching this conclusion, the Authority noted that while the change was permanent, it affected only one unit employee. Further, the Authority noted that although the change resulted in the loss to Porter of his 10 percent differential pay, the Respondent had reduced the impact of this loss by delaying the implementation until after a general pay raise had become effective.

The Authority concluded, therefore, that the Respondent was under no obligation to bargain with the Union, and that the change in the tour of duty did not violate the Statute. In view of this conclusion, the Authority did not address the Judge's other findings, including his discussion as to whether the Union had properly invoked the Panel's services. Accordingly, the Authority dismissed the complaint.

E. The Authority's Revised Standard

In HHS, SSA, the Authority reassessed and modified the standard previously used to identify changes in conditions of employment that require bargaining. The Authority stated that in order to determine whether a change in conditions of employment requires bargaining, it would carefully examine the pertinent facts and circumstances presented in each case; and that in examining the record, principal emphasis would be placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment. The Authority also stated that equitable considerations would be taken into account in balancing the various interests involved; that the number of affected employees and the parties' bargaining history would be given limited application; and that the size of the bargaining unit would no longer be a consideration.

IV. The Parties' Positions

A. The General Counsel

The General Counsel contends that the Authority should reverse its previous decision and find that the nature and extent of the Respondent's change in Porter's tour of duty gave rise to a duty to bargain.

The General Counsel notes that due to the change in his tour of duty, Porter was required to work from 7:00 a.m. to 3:30 p.m., rather than from 3:00 a.m. to 11:30 a.m. as he had for several years. The General Counsel states that this change prevented Porter from participating in a carpool arrangement to transport his child to and from school and required him to pay the additional cost for bus fare for that child. The General Counsel also argues that the change was permanent and that it affected the amount of Porter's pay. According to the General Counsel, Porter lost almost $2,000 per year in night differential pay due to the change. The General Counsel also contends that the change in hours significantly affected the amount of work performed by Porter and the safety of his working conditions.

The General Counsel notes that in HHS, SSA, the Authority emphasized that the number of affected employees is no longer a controlling consideration in determining whether a change requires bargaining, and that equitable considerations will also be taken into account. The General Counsel contends that further bargaining in this case may have resulted in additional arrangements to lessen the impact of the change on Porter. The General Counsel concludes, therefore, that the Authority should find that the nature and extent of the Respondent's change of

Porter's tour of duty gave rise to a duty to bargain and that the Respondent violated the Statute when it implemented the change without completing the bargaining process.

The General Counsel also argues that the negotiation impasse was properly before the Panel prior to implementation because: (1) the Union had requested the assistance of FMCS to resolve the impasse; (2) the Union had notified the Panel that it had sought FMCS assistance; and (3) the Respondent was aware that the parties were at impasse and that the Union had sought FMCS assistance. The General Counsel also contends that the failure of FMCS or the Panel to respond to the Union's requests is irrelevant to the issue whether the matter was before the Panel. The General Counsel contends that in any event the Respondent did not give the Union a reasonable opportunity to seek Panel assistance before the Respondent implemented the change.

The General Counsel also notes that in its Order Denying Request for General Ruling, 31 FLRA 1294 (1988), the Authority stated that statutory and regulatory requirements concerning the resolution of impasses must be observed, including the use of FMCS or other third-party mediation services to resolve the negotiation impasse. The General Counsel claims that in this case the parties' dispute was clearly pending at least before the FMCS prior to the effective date of the change, and the Respondent was, therefore, obligated to maintain the status quo.

B. The Union

The Union argues that the Respondent had a duty to bargain over the substance of its decision to change Porter's work hours, as well as over the impact of the change. The Union points out that due to the change, Porter was required to work a tour of duty beginning at 7:00 a.m. rather than at 3:00 a.m. According to the Union, this change caused Porter to incur increased costs to transport his child to and from school and to lose night differential pay of about $2,000 per year. The Union concludes, therefore, that the Authority should find that the impact of the Respondent's change in Porter's tour of duty gave rise to a duty to bargain and that the Respondent violated the Statute when it implemented the change without completing bargaining.

The Union also asserts that the parties must demonstrate that they have made a sincere attempt to resolve their impasse by using the services of FMCS before the Panel will attempt to resolve a negotiation impasse. The Union argues that it properly followed the procedures required by FMCS and the Panel. The Union contends, therefore, that because the parties bargained to impasse and the Union properly invoked the services of FMCS and the Panel, the Respondent was required to maintain the status quo.

C. The Respondent

The Respondent argues that the Authority should not apply the HHS, SSA standard retroactively to this matter. The Respondent contends that it did not violate the Statute because its actions were consistent with Authority law at the time the matter arose.

The Respondent also argues that even under the standard set forth in HHS, SSA, the impact of the change did not give rise to a duty to bargain. The Respondent asserts that only one employee was involved, that he suffered no change in job duties or loss in grade, and that his loss of night differential pay was postponed while the parties bargained and until a general wage increase became effective. The Respondent also notes that the reason for the change was to correct an existing safety hazard and to increase the effectiveness of the Battery Shop operation. Weighing the equities under the standard in HHS, SSA, the Respondent argues that the change did not give rise to a duty to bargain.

Further, the Respondent argues that even if the effect of the change is found to give rise to a duty to bargain, the Respondent was justified in implementing the change when it did. The Respondent argues that the parties had bargained to impasse and the Union, as found by the Judge, had not properly invoked the services of the Panel. The Respondent asserts that it was permitted, therefore, to implement the change. The Respondent also contends

that a request for assistance to FMCS does not obligate it to maintain the status quo. Finally, the Respondent contends that the Union was not foreclosed from seeking Panel assistance, and that the Union's ineffective submission to the Panel was insufficient to require the Respondent to maintain the status quo.

V. Discussion

A. The Scope of the Respondent's Duty to Bargain

1. The Decision to Change Porter's Hours of Work Was Negotiable Only at the Election of the Respondent

(a) The Analytical Framework

Section 7106(b)(1) of the Statute provides that an agency may elect, but is not required, to negotiate "on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty[.]" A "tour of duty" is "the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek." 5 C.F.R. 610.102(h). Therefore, an employee's daily tour of duty is his or her hours of work, and any change in the employee's work hours is a change in his or her tour of duty.

Agencies are required to schedule employees' tours of duty not less than 7 days in advance, except where it is determined that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased. 5 U.S.C. 6101(a)(3)(A); 5 C.F.R. 610.121(a) and (b). See National Association of Government Employees, Local R7-23 and Department of the Air Force, Scott Air Force Base, Illinois, 23 FLRA 753 (1986). Accordingly, employees must have at least 7 days' advance notice of a change in work schedules unless the change is made for a reason stated in the law. Id.

In determining whether a matter concerning changes in employees' hours of work is within the scope of section 7106(b)(1), the Authority previously has made distinctions between: (1) changes in employees' hours of work which were integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty (see, for example, National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 117 (1982)); and (2) changes which permit "a modicum of flexibility within the range of starting and quitting times for [an] existing tour of duty" National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927, 930 (1979); see also U.S. Customs Service, Region V, 9 FLRA at 118-19. As to the former category of cases, the changes in employees' hours of work were found to be outside the duty to bargain; as to the latter category, the changes in hours were found to be within the duty to bargain. It has been noted that these distinctions are subtle ones. See, for example, Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA 832, Judge's Decision at 842 (1988); National Treasury Employees Union v. FLRA, 732 F.2d 703 (9th Cir. 1984).

This case presents an opportunity to clarify the bargaining obligations with respect to changes in employees' hours of work. On our review of this area, we find that the distinctions previously used are not supported by the relevant statutory and regulatory provisions.

As noted above, an employee's daily tour of duty consists of the hours that the employee works; that is, from the time when the employee starts work until he or she ends work. A decision as to what will constitute an employee's tour of duty is a decision by management as to when and where an employee's services can best be used. When an agency changes an employee's hours, that change, under applicable statutory and regulatory provisions, results in a new tour of duty for the employee. The degree of the change -- whether it is a l-hour change or an 8-hour

change -- does not alter the fact that the change results in a new tour of duty for the employee. A change in employees' starting and quitting times is a change in their tours of duty.

Changes in employees' tours of duty affect the "numbers, types, and grades of employees . . . assigned to . . . [a] tour of duty" within the meaning of section 7106(b)(1) of the Statute. For example, when an agency changes 10 employees' tours of duty by moving the employees from a day shift to a night shift, that change affects the numbers of employees assigned to both tours of duty -- it decreases by 10 the number of employees assigned to the day tour of duty and increases by 10 the number of employees assigned to the night tour of duty. Therefore, an agency's decision to make these types of changes is negotiable only at its election under section 7106(b)(1) of the Statute. To the extent that previous decisions of the Authority are to the contrary, they will no longer be followed.*

Consistent with the statutory and regulatory provisions discussed above, agencies must generally give appropriate notice to employees of changes in their tours of duty. Further, the fact that an agency's decision to change employees' tours of duty is negotiable only at the agency's election should not be viewed as encouraging agencies not to bargain over these changes. Moreover, even where an agency exercises its right under section 7106(b)(1) not to bargain over the change itself, an agency has an obligation to bargain over the matters set forth in sections 7106(b)(2) and (3) of the Statute: procedures to be observed by management in exercising its authority and appropriate arrangements for employees adversely affected by management's exercise of its authority.

(b) Application of the Framework in this Case

In this case, Porter was the only employee in the Battery Shop. The Battery Shop is responsible for distributing serviceable batteries and receiving returned unserviceable batteries from other operations at the facility. The Respondent decided to change the hours of the Battery Shop from 3:00 a.m. to 11:30 a.m. to 7:00 a.m. to 3:30 p.m. The change was made to improve the availability of batteries during peak usage hours, thereby better serving other operations at the facility, and to enhance Porter's safety by increasing the likelihood that other employees would be available to assist him in the event of an accident.

The change in Porter's hours was a change in his tour of duty. The Respondent's decision to change Porter's tour of duty resulted in a change in the numbers, types, and grades of employees or positions assigned to a tour of duty within the meaning of section 7106(b)(1) of the Statute -- it eliminated the existing tour of duty and increased by one the number of employees on the 7:00 a.m. to 3:30 p.m. tour of duty. The change, therefore, was negotiable only at the election of the Respondent. Accordingly, the Respondent was not obligated to bargain over the substance of the decision to make a change in Porter's hours. We will now turn to the question of the extent of the Respondent's duty to bargain over the impact and implementation of the change.

2. The Respondent Was Obligated to Bargain Over the Effect of the Change

We reject the Respondent's argument that we should not apply the standard established in HHS, SSA, but rather should apply the standard as it was at the time the Respondent's actions took place. Unfair labor practice complaints are resolved based on the state of the law at the time the case is decided. U.S. Department of the Treasury, 27 FLRA 919, 923 (1987). Further, the court remanded the record in this case to the Authority to enable it to apply the new standard, so as to permit the Authority to take into account the equitable considerations needed to balance the various interests of the parties involved. See Environmental Protection Agency and Environmental Protection Agency, Region II, 25 FLRA 787 (1987).

As a result of the change in his tour of duty, Porter was required to work from 7:00 a.m. to 3:30 p.m., rather than from 3:00 a.m. to 11:30 a.m. This change resulted in the permanent loss to Porter of about 10 percent of his pay: a loss of about $2,000 per

year. Applying the revised standard of HHS, SSA and noting the permanent loss to Porter of a significant amount of pay, we conclude that the Respondent had a statutory obligation to bargain with the Union over the effect or reasonably foreseeable effect of the change on Porter's conditions of employment.

B. The Respondent Was Permitted to Implement the Change at the Time That It Did

As set forth above, the parties met and bargained over the Union's proposals concerning the change and acknowledged that they had reached impasse. The Union thereupon sent letters requesting the services of FMCS and notifying the Panel of the situation, but not requesting Panel assistance. Apart from the Union's letters, nothing in the record of this case reflects any other communication by the Union or the Respondent with FMCS or the Panel or any action taken by either FMCS or the Panel to resolve the impasse. In light of our finding that the Respondent had a duty to bargain over the effect or reasonably foreseeable effect of the change, we must decide whether in these circumstances the Respondent had a duty to maintain the status quo, or whether the Respondent was permitted to implement the change at the time that it did.

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466, 469 (1985), the Authority stated:

"[O]nce parties have reached an impasse in their negotiations and one party timely invokes the services of the Panel, the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate."

Whether the status quo must be maintained after parties have reached impasse depends on varying factors and involves the evaluation of the facts in each case. Order Denying Request For General Ruling, 31 FLRA 1294. As relevant to this case, we must determine: (1) whether the Respondent provided the Union with a reasonable opportunity to request the services of the Panel; (2) whether the Union properly invoked the services of the Panel; and (3) whether the Union's letter to FMCS obligated the Respondent to maintain the status quo.

1. The Respondent Provided the Union With a Reasonable Opportunity to Invoke the Services of the Panel

On December 1, 1981, the parties met and bargained but did not reach agreement. The parties acknowledged that they were at impasse and the meeting ended. On December 23, the Respondent advised the Union that the change in Porter's tour of duty would be effective on January 10, 1982. The Union responded on the same day and sent letters, as set forth above, to FMCS and the Panel. In its letter to the Respondent, the Union asked the Respondent to maintain the status quo and to help the Union enlist the help of FMCS. The Union did not state in its letter or otherwise indicate that the notice given to it by the Respondent was insufficient to allow a reasonable opportunity to timely invoke the services of the Panel.

We find that the Respondent's notification to the Union on December 23, 1981, that the change would be effective on January 10, 1982, gave the Union sufficient time in which to invoke the services of the Panel prior to the implementation, and we reject the General Counsel's assertion to the contrary. See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 217 (1984); U.S. Customs Service, 16 FLRA 198 (1984); and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 288 (1981).

2. The Union Did Not Properly Invoke the Services of the Panel

In its previous decision, the Authority found it unnecessary to address whether the Union properly invoked the services of the Panel. 20 FLRA at 860 n.5. We must now consider whether the Union properly invoked the services of the Panel before the change was implemented. We find that it did not.

The Union's letter of December 23, 1981, to the

Panel did not request Panel assistance to resolve the impasse; it merely provided the Panel with a status report of the situation. Moreover, the letter was not accompanied by specific information, such as a statement of the issues at impasse and related information on the parties' negotiations, required by the Panel's Rules and Regulations, and there is no showing that this evidence was thereafter furnished to the Panel. Further, there is no evidence in the record that the Union attempted any further communication with the Panel. As the Judge stated, there is no explanation as to "why, if the Union was genuinely seeking FSIP and FMCS intervention in this matter, it did not communicate with those agencies after the initial letters of December 23 were sent." Judge's Decision, 20 FLRA at 867 n.7. Moreover, as the Judge found, there is nothing in the record to suggest that the Panel was aware that its services were being sought. In these circumstances, we agree with the Judge that the Union did not invoke the services of the Panel so as to preclude the Respondent from implementing the change.

3. The Union's Letter to FMCS Was Not Sufficient to Require the Respondent to Maintain the Status Quo

The General Counsel and the Union contend that even if the Union did not properly invoke the services of the Panel, the Union's letter to FMCS was sufficient to require the Respondent to maintain the status quo. We disagree.

The Respondent advised the Union on December 23, 1981, that it intended to implement the change in Porter's hours on January 10, 1982. The Union's December 23, 1981, letter to FMCS requested its services to help resolve an impasse over a unit employee's duty hours. Although the letter requested FMCS assistance "as soon as possible," it did not inform FMCS that the Respondent intended to implement the change in the duty hours on January 10, 1982. FMCS apparently received the Union's letter on December 28, 1981, but there is no showing in this record that FMCS contacted either party at any time before or after implementation of the change to acknowledge that the matter was before it or to arrange any mediation assistance. Moreover, as the Judge noted, there is no evidence of any attempt by the Union to follow up on its letter to FMCS by inquiring as to whether FMCS would provide assistance to resolve the impasse. The Union had sufficient time to make such an inquiry before the planned implementation of the change.

In these circumstances, we decline to hold that the mailing of a letter to FMCS, without any further action by the Union and without any mediation assistance provided by FMCS, is sufficient to preclude the Respondent from implementing a change designed to correct an existing safety hazard and to increase the effectiveness of the Respondent's operation. Consistent with our decision in Order Denying Request for General Ruling, 31 FLRA 1294, our decision in this case is based on our evaluation of the particular facts in the record before us. Since the issue is not presented in this case, we do not decide whether an agency commits an unfair labor practice if it implements a change as to a matter at impasse at a time when FMCS is working with the parties in an attempt to resolve the impasse.

VI. Conclusion

We have considered the entire record in this case in light of our decision in HHS, SSA and find that the Respondent had an obligation to bargain over the effect of the change in Porter's tour of duty. We find that the parties bargained on the matter to a point at which they acknowledged they were at impasse, and that the Respondent provided the Union with a reasonable opportunity to invoke the services of the Panel. We further find that the Union failed to invoke the services of the Panel prior to the implementation of the change, and that its letter to FMCS, without more, did not require the Respondent to maintain the status quo. We find, therefore, that the Respondent was permitted to implement the change when it did. Accordingly, we conclude that the Respondent did not violate sections 7116(a)(1) and (5) of the Statute when it implemented the change in Porter's tour of duty.

VII. Order

The complaint in this case is dismissed.

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* In some instances, bargaining over flexible work schedules has been specifically authorized by statute. See, for example, American Federation of Government Employees, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA 872 (1986). Those instances are not affected by our decision in this case.

